FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1937

No. 73

STATE OF MINNESOTA, by its Attorney General,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Circuit Court of Appeals—Eighth Circuit No. 10,905

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM S. ERVIN,
Attorney General State of Minnesota,
ORDNER T. BUNDLIE,
Assistant Attorney General State of Minnesota,
Attorneys for Petitioner.

INDEX.

Subject Index.

Land Decisions—Department of Interior.

Regulations of Department of Interior.

Table of Statutes Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM 1937

No. .....

STATE OF MINNESOTA, by its Attorney General, *Petitioner,* vs. UNITED STATES OF AMERICA, *Respondent.*	Circuit Court of Appeals—Eighth Circuit No. 10,905

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, State of Minnesota by its Attorney General, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, to review the judgment of that court in this cause, filed March 12, 1938, reversing the order of the United States District Court for the District of Minnesota, Fifth Division, and directing a dismissal of the State's action in condemnation (R. 92). A certified transcript of the record in the case, including the proceedings in the Circuit Court of Appeals for the Eighth Circuit is furnished herewith in compliance with Rule 38 of the rules of this court.

I.

JUDGMENT BELOW.

This writ is sought to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, rendered and filed on March 12, 1938, (R. 92) which, in effect, prohibits the State of Minnesota from condemning for state trunk highway purposes lands allotted in severalty to individual Indians.

II.

QUESTIONS PRESENTED.

1. Whether or not Section 3 of the Act of March 3, 1901, 31 Stat. 1084 (25 U. S. C. A. Sec. 357) authorizes the State of Minnesota to condemn under its State laws for State trunk highway purposes lands allotted in severalty to individual Indians in the same manner as though the Indians were the fee owners thereof, and grants consent thereto without making the United States a necessary party to said proceedings.

2. Whether or not the Treaty of September 30, 1854 (10 Stat. 1109) with the Grand Portage Band of Chippewa Indians of Lake Superior, and the subsequent Act of Congress approving same January 14, 1889 (25 Stat. 642) expressly grants to the State the authority to construct highways over and across lands allotted in severalty to individual Indians, upon paying just compensation therefor as provided by the last sentence of Article III thereof, as follows: "All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

3. Whether or not the State, in its sovereign capacity and in the exercise of its governmental functions in the location and construction of a constitutional State trunk highway required to be so located and constructed by its Constitution and laws, may exercise its inherent power of eminent domain for such purposes over and across lands allotted in severalty to individual Indians, either with or without express Congressional authority therefor.

III.

STATUTES, TREATY AND STATE CONSTITUTION INVOLVED.

There are four statutes primarily involved in this case, as follows:

(a) Act of Congress of March 3, 1901, Chapter 832, Section 3, 31 Stat. 1084 (25 U. S. C. A. 357) as follows:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

(b) Act of March 3, 1901, Chapter 832, Section 4, 31 Stat. 1084, (25 U. S. C. A. 311), which provides:

> "The Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper state or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not

been conveyed to the allottee with full power of alienation."

(c) Act of March 3, 1901, Chapter 832, Section 3, 31 Stat. 1084, (25 U. S. C. A. 319) providing at the beginning of said Act:

"The Secretary of the Interior is authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines * * * through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, * * * No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval, * * *."

(d) Treaty between Federal Government and the Grand Portage Band of Chippewa Indians of Lake Superior, dated September 30, 1854, (10 Stat. 1109) and the Act of Congress approving January 14, 1889, (25 Stat. 642), the salient portion of the Treaty found in the last sentence of Article III thereof, as follows:

"All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

(e) Constitution of the State of Minnesota, Article 16, Section 1 thereof, as follows:

"There is hereby created and established a trunk highway system, which shall be located, constructed, reconstructed, improved and forever maintained as public highways, by the State of Minnesota. The said high-

ways shall extend as nearly as may be along the following described routes, the more specific and definite location of which shall be fixed and determined by such boards, officers or tribunals, and in such manner, as shall be prescribed by law, but in fixing such specific and definite routes there shall not be any deviation from the starting points or terminals set forth in this bill, nor shall there be any deviation in fixing such routes from the various villages and cities named herein, through which such routes are to pass."

Route 1 thereof, described in the Constitution, is the location of the trunk highway concerned herein.

(f) Section 2554, Subdivision 1 Mason's Minnesota Statutes 1927, a portion thereof, concerning the powers of the commissioner of highways, as follows:

"The commissioner of highways is empowered to carry out the provisions of Section 1 of Article 16, of the Constitution of the state, and is hereby authorized to acquire by purchase, gift, or condemnation as provided by statute all necessary right of way needed in laying out and constructing the trunk highway system, and to locate, construct, reconstruct, improve and maintain such trunk highway system, * * *; and in carrying out the provisions of said Section 1, of Article 16 of the Constitution of the State, is hereby authorized to expend out of the trunk highway fund such portions thereof as may be available for the purposes herein provided, * * *."

IV.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This proceeding originated in an action by the State of Minnesota through its Attorney General and at the request of its Commissioner of Highways to condemn an easement for trunk highway purposes in Cook County, Minnesota, on lands allotted in severalty to individual Indians. The proceeding was commenced in the State District Court, Eleventh Judicial District, Cook County, Minnesota, on February 6, 1936 (R. 1-11). The condemnation was instituted in the furtherance of the permanent location and subsequent construction of constitutional route No. 1, now known as state trunk highway No. 61 and United States highway No. 61, as authorized by Article 16 of the State Constitution and the Public Highways Act, Chapter 323, Session Laws of Minnesota of 1921. The easement sought was for right of way for trunk highway purposes, concerning nine non-contiguous, separate parcels of land which had been allotted in severalty to individual Indians by the issuance of trust patents. The lands allotted in severalty to such individual Indians form a part of the Grand Portage Indian Reservation granted for the use and benefit of the Grand Portage Band of Chippewa Indians of Lake Superior by Treaty of September 30, 1854 (10 Stat. 1109) and an Act of Congress approving January 14, 1889 (25 Stat. 642).

In February, 1934, long prior to the institution of the condemnation proceeding the Commissioner of Highways of the State, pursuant to law, made and filed his permanent location of said trunk highway over and across lands in Cook County, including the allotted Indian lands affected herein,

as evidenced by the State's center line order and width order introduced in evidence in such proceedings (R. 41, 44), which orders, in accordance with State law, provide the only methods and means of designating the permanent location of a state trunk highway. Thereafter the State, by purchase and condemnation, acquired all the necessary right of way for said highway in Cook County within said designation with the exception of the nine parcels of land affected in the instant case. In this proceeding the Indian allottees were made parties respondent in the State court, as well as the Superintendent of the Consolidated Chippewa Agency and the United States of America (R. 1).

Subsequent to the commencement of the proceeding a stipulation dated April 7, 1936, was entered into between the State and the United States Attorney for the District of Minnesota (R. 24), providing for the removal of the case from the District Court, Cook County, Minnesota, Eleventh Judicial District, to the United States District Court for the District of Minnesota, Fifth Division, and under order dated April 8, 1936, pursuant to said stipulation, the State court ordered the removal of the case for hearing and further proceeding to the Federal District Court (R. 26). Such stipulation also provided, in part, "at which time the petition of the State of Minnesota may be heard and such proceedings had thereon as prayed in the said petition." (R. 25).

The condemnation petition came on for hearing before the Federal District Court, District of Minnesota, Fifth Division, on September 16, 1936, at which time the State presented its petition and the Court received in evidence such center line and width orders, as well as a map showing the specific parcels of allotted Indian lands sought to be acquired for trunk highway purposes (R. 41-48). The United

States appeared specially, objecting to the granting of the petition and sought a dismissal of the proceedings on the ground, among others, that the court was without jurisdiction for the reason that the United States had not consented to the maintenance of the condemnation suit against it (R. 48).

On December 23, 1936, the said Federal Court made and entered its order denying the motion of the United States and granting in all things the petition of the State of Minnesota, (R. 58) expressly adjudging "that consent of the United States to bring these proceedings against the Indian allottees has been expressly granted and given by the United States to the State of Minnesota, pursuant to 25 U. S. Code Annotated, Section 357, and that the United States accordingly is not a necessary party respondent to these proceedings." (R. 59).

The United States on March 18, 1937, appealed from such order granting the State's condemnation to the Circuit Court of Appeals, Eighth Circuit (R. 71), and pending such appeal the State made a motion for dismissal thereof on the grounds that the order was not appealable and the appeal was prematurely and untimely made (R. 81), which motion was denied by the Circuit Court without prejudice to the State to renew the motion in connection with the presentation of the merits of the case (R. 83). On March 12, 1938, the Circuit Court rendered its decision and judgment reversing the lower Federal Court and directing a dismissal of the condemnation proceeding (R. 92). The mandate was issued to the lower Federal Court, March 31, 1938 (R. 93).

A writ is sought for the purpose of reviewing the decision of the Circuit Court of Appeals, Eighth Circuit, and judgment entered pursuant thereto upon the grounds and reasons hereinafter set forth.

V.

REASONS FOR GRANTING THE WRIT.

The discretionary power of this court to grant a writ of certiorari is urged and invoked upon the following grounds:

1. The Circuit Court of Appeals for the Eighth Circuit has interpreted Section 3 of the Act of March 3, 1901, (25 U. S. C. A. 357) in a way untenable and in conflict with the weight of authority and long established practice, causing great doubt and confusion and, therefore, necessitating the final determination by this Court.

2. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

3. The Circuit Court held, in effect, that the State had no right to condemn, for trunk highway purposes, lands allotted in severalty to individual Indians pursuant to 25 U. S. C. A. 357, supra, without obtaining the consent of the United States and the permission of the Secretary of the Interior to so condemn (R. 90, 91), thereby directly connecting said Section 357 with Section 4 of the Act of March 3, 1901 (25 U. S. C. A. 311). The latter section authorizes the Secretary of Interior to grant permission to proper State and local authorities upon compliance with certain requirements for the establishment of public highways through *Indian Reservations* as well as allotted Indian lands. It must be noted that Section 357 concerns only one type of land, namely allotted Indian lands, and as to such lands the authority to condemn for any public purpose is expressly granted, whereas Section 311 covers both tribal lands and allotted Indian lands and the opening of public highways is contingent upon consent of the Secretary of Interior,

obviously presenting a separate and distinct method of acquiring right of way without condemnation proceedings. The Circuit Court fails to distinguish between these two sections as they affect Indian Reservations or lands owned by United States in trust for the tribe and the type of lands herein concerned, namely allotted Indian lands. This is clearly manifested by a reliance upon the case of United States vs. Colvard, 89 Fed. (2d) 312, (R. 90), which is not determinative or decisive of the question presented herein. The Colvard case did not concern allotted Indian lands, but did affect strictly tribal lands, lands owned in fee by the United States in trust for the tribe and not in trust for individual Indians. There is no Federal statute granting the right of condemnation of Indian tribal lands for highway purposes. The only authority for condemnation for public purposes is Section 357 supra, which deals with and only concerns lands allotted in severalty to individual Indians. The case of United States vs. Colvard, supra, is, therefore, totally unrelated to the instant case and does not support the decision of the Circuit Court. Further discussion showing the differentiation between the two cases will be set forth in the supporting brief.

4. The Circuit Court, as its other main authority in support of its decision, cites the case of Utah Power and Light Company vs. United States, 243 U. S. 389 (R. 88), which case likewise does not concern allotted Indian lands nor does it pass upon said Section 357, supra. That case involved power lines placed by a utility company across a Federal forest reservation without condemnation proceedings for an easement or the acquirement of an easement from the Secretary of Interior. The United States successfully brought an action to effect the removal of such lines. That case will be discussed in the supporting brief.

The instant case is in direct conflict with the only other reported decision interpreting 25 U. S. C. A. 357. The case of Shell Petroleum Corporation vs. Town of Fairfax, 180 Oklahoma 326, 69 Pac. (2d) 649, decided June 16, 1937, directly interprets Section 357 and expressly holds that allotted Indian lands may be condemned for any public purpose, that Section 357 grants such right, and that the United States is not a necessary party to the proceeding by virtue of the consent given in Section 357 to maintain such proceedings. The Shell case is discussed at greater length in the supporting brief.

5. The Circuit Court's decision is in direct conflict with and entirely ignores the official regulations and the interpretation, construction and application given to said Section 357 supra, concerning rights of way over Indian lands consistently adhered to and given by the executive department charged with their administration for over thirty years. The Department of Interior has directly construed and interpreted Section 357 supra as evidenced by the following decisions:

35 Land Decisions 648
45 Land Decisions 563
49 Land Decisions 396

These land decisions directly construe Section 357 as granting the express right to the State to condemn allotted Indian lands under the laws of the state or territory where located for any public purpose. The Department of Interior, in harmony with this interpretation, has issued its official regulations concerning rights of way over Indian lands, printed in 1929 and approved May 22, 1928. These regulations, Paragraphs 68, 69 and 70, under the heading of "Con-

demnation of Allotted Lands" cite Section 357 supra and construe same as granting the right to condemn allotted Indian lands for any public purpose in accordance with the laws of the State or territory where the lands are so situated. The land decisions and regulations are discussed in the supporting brief.

6. The Circuit Court has wholly failed to pass on and interpret the provision of Article 3 of the Treaty of September 30, 1854 (10 Stat. 1109) and the Act of Congress approving January 14, 1889 (25 Stat. 642), which provides that, "all necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts shall have the right of way through the same, compensation being made therefor as in other cases."

7. The Circuit Court decision precludes the State from performing one of its major governmental functions required to be so performed by its Constitution and State laws in the location, construction and maintenance of one of the major constitutional trunk highways of the State. It is here urged that the location and construction of a state trunk highway through allotted Indian lands would not be such a use as would prejudice the rights of the individual Indians or the United States or be inconsistent with the use thereof, but would prove a vast benefit to the individual Indians and the lands. It is important, therefore, and necessary that the Court review this case so that the rights of the State may be determined with relation to the proper exercising of its duties imposed by law. It is likewise important that this court construe the fundamental and inherent right of the State to exercise its power of eminent domain for a public purpose over allotted Indian lands held in trust for individual Indians, regardless of whether or not there may be

express Congressional authority to so condemn. It is the contention of the State that this right exists as being one of the inherent powers of the State and that even in the absence of an express Congressional act, that this right has always remained in the State. This was the view and interpretation by the Interior Department prior to the enactment of the Act of March 3, 1901, and particularly Section 357 supra. See 19 Land Decisions 24. This right was later affirmed by the Department after the passage of said Act as evidenced by its official regulations of 1928 supra, and 49 Land Decisions 396.

8. It is important, not only to the State of Minnesota, but also to such other states wherein are situated vast areas of lands allotted in severalty to individual Indians, that the questions here presented be finally determined by this Honorable Court. Vested rights and land acquisitions heretofore acquired for various public purposes of great value and magnitude are placed in jeopardy by reason of the decision of the Circuit Court in this case. The State of Minnesota has successfully conducted many condemnations for public purposes through Indian lands of this nature, pursuant to section 357 supra and the land decisions and regulations of the Department of Interior construing the same. We are informed and believe that this practice has been followed for many years in other states as well. It is urged that these vested rights be not lightly set aside.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Eighth Circuit to the end that this cause may be reviewed and determined by this court, and that the judgment of the Circuit Court of Appeals for the

Eighth Circuit be reversed; all based upon the reasons and grounds hereinbefore recited.

WILLIAM S. ERVIN,
Attorney General of Minnesota,

ORDNER T. BUNDLIE,
Assistant Attorney General of Minnesota,
Attorneys for Petitioner,
Saint Paul, Minnesota.

STATE OF MINNESOTA,
COUNTY OF RAMSEY—ss.

Ordner T. Bundlie, being duly sworn upon oath states that he is one of the duly acting and qualified Assistant Attorneys General of the State of Minnesota and one of the attorneys for the petitioner named in the foregoing petition, and makes this affidavit for and on behalf of said petitioner; that he has read the same and knows the contents thereof and that the facts therein are true to the best of his knowledge, information and belief.

ORDNER T. BUNDLIE.

Subscribed and sworn to before me
this 12th day of May, 1938.
E. F. KRAUSE,
E. F. Krause
Notary Public, Ramsey County, Minn.
My Commission Expires March 15, 1945.
(Notarial Seal)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURT BELOW.

The order granting condemnation to the State by the Federal District Court, District of Minnesota, Fifth Division, appears in the Record at page 58 and no opinion has been made. The opinion of the Circuit Court of Appeals for the Eighth Circuit is found in the Record at page 84 and is reported in 95 Fed. (2d) 468.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals, Eighth Circuit, to be reviewed was dated and entered March 12, 1938 (R. 92). Jurisdiction is conferred upon this court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

III.

STATEMENT OF THE CASE.

A statement of the case is set forth in the foregoing petition under the caption "Summary Statement of Matter Involved" to which reference is hereby made.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court erred in reversing with direction to dismiss the order of the District Court of the United States, District of Minnesota, Fifth Division, granting the State's condemnation.

2. The Court erred in construing Section 3 of the Act of March 3, 1901, (25 U. S. C. A. 357) as being subordinate and subject to the consent of the United States to the State's condemnation proceedings, and that the State's condemnation for the opening of the state trunk highway was conditioned upon such consent as provided in Section 4 of the Act of March 3, 1901 (25 U. S. C. A. 311).

3. The Court erred in failing to interpret and construe the Treaty between the Federal government and the Grand Portage Band of Chippewa Indians of Lake Superior of September 30, 1854 (10 Stat. 1109) and the Act of Congress approving January 14, 1889 (25 Stat. 642) and particularly the express right granted under the terms of the treaty as approved by Congress which, under Article 3, the last sentence thereof, contained a direct covenant that "all necessary roads, highways and railroads the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

4. The Court erred in precluding the State from exercising its inherent power of eminent domain for a public purpose necessary and requisite in the performance of a duty imposed by its Constitution and laws, requiring the State to locate and construct its trunk highway system, where such governmental function would not be prejudicial to or incon-

sistent with the use of said lands by the individual Indians or the Federal government.

V.

ARGUMENT.

A.

Federal Statute authorizes State's condemnation.

The State relies, as authority for its condemnation proceedings, upon the Act of Congress of March 3, 1901, Chapter 832, Section 3, 31 Stat. 1084, (25 U. S. C. A. 357), hereinafter referred to as Section 357, which by its terms expressly authorizes and consents to the condemnation of allotted Indian lands for any public purpose under the state or territorial laws where the land is located. This Federal statute is so clear, concise and free from ambiguity in its meaning that there can be no plausible argument but that Congress gave its express consent to a proceedings of this kind and granted direct authority for proper public authorities to condemn lands allotted in severalty to Indians for any public purpose, as provided by the Act itself, as follows:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned and the money awarded as damages shall be paid to the allottee."

In construing this act, petitioner herein respectfully calls the attention of this court to the policy, procedure and practice consistently followed for over thirty years by the Department of Interior, the department having administration of Indian lands and affairs.

The question of the right of a State or political subdivision to condemn allotted Indian lands for public purposes has been determined and settled by the Department of Interior, both prior and subsequent to the enactment of said Section 357. Prior to such enactment, the Secretary of the Interior applied to the Attorney General for an opinion on two questions, (1) "Does such right of eminent domain exist, either in the United States government, or in the State of Montana, as warrants the taking of any part of the lands awarded to the Crow Indians in severalty for the purposes mentioned?" and (2) "In which sovereign does that right exist, the United States government, or the State?"

The opinion and answer to these questions was prepared by Assistant Attorney General Hall on June 25, 1894, and duly approved by the Honorable Hoke Smith, Secretary of the Interior, when such an opinion was adopted as a ruling of the Department. This decision is found in the decisions of the Department of Interior relating to public lands, Volume 19 Land Decisions 24, in which the first question is answered by upholding the right of a State to condemn allotted Indian lands for public purposes. In answer to the second question as to which sovereign has the right to condemn, the decision holds, "In conclusion it follows that the State of Montana has the right to condemn, under proper procedure, for public purposes, lands embraced in Indian allotments in said State." It therefore appears that pursuant to the Department's own decision, even before the express right to condemn as evidenced by Section 357 supra was enacted, it recognized the right of a State to condemn allotted Indian lands for public purposes and by so doing, no doubt numerous condemnations over such lands were successfully conducted by the various States and political subdivisions.

We now come to the enactment of Section 357 which is the last paragraph of Section 3 of the Act of March 3, 1901. Said Act was primarily an appropriation act, and, in accordance with the well established practice of Congress, certain provisions of general law were added or tacked on, so to speak, to the appropriation measure. It is well known that many of the most important acts of Congress pertaining to the Indians and their lands have been enacted as "riders to the appropriation bill." The Congressional Record of the Senate of the 56th Congress, Second Session, Volume 34, Part 2, discloses such to be the case, for such record discloses said proceedings on January 25, 1901 in the Senate concerning said Section 357. The record on pages 1447 and 1448 is as follows:

"The reading of the bill was continued to the end of section 3, on page 67.

Mr. Pettigrew: The Committee on Indian Affairs authorizes me to offer an amendment, and I think it should come in at the end of section 3, after line 11, on page 67. I send it up now, and I call the attention of the Chairman of the Committee to it.

The Presiding Officer: The proposed amendment will be read.

The Secretary: Insert at the end of line 11, on page 67 the following: "That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

Mr. Thurston: The Committee authorized the moving of this amendment. I will look it over.

The Presiding Officer: The reading of the bill will be continued.

The Secretary resumed and concluded the reading of the bill.

Mr. Thurston: The amendment proposed by the Senator from South Dakota is in accordance with the recommendation of the Committee, and I ask that the Senate agree to it.

The Presiding Officer: The proposed amendment will be read for the information of the Senate.

The Secretary: After line 11 on page 67 insert:

"That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

The amendment was agreed to."

The history of the enactment of Section 357 conclusively shows that it was offered as an amendment, separate and distinct from the other portions of Section 3, as well as all of Section 4 of the Act, and such amendment grants an additional and exclusive method, by condemnation, of acquiring allotted Indian lands for public purposes. The Circuit Court (R. 90) quotes Section 4 of the Act of March 3, 1901 (25 U. S. C. A. 311), which grants authority to the Secretary of the Interior to grant permission to proper State or local authorities for the opening and establishment of public highways in accordance with the laws of the state or territory in which the lands are situated, both through Indian Reservations or through any lands which may have been allotted in severalty to the Indians under the laws or treaties. In its opinion (R. 91) the Court also refers to the first part of Section 3 of the Act of March 3, 1901 (25 U. S. C. A. 319) which relates to the power of the Secretary of the Interior to grant rights of way in the nature of an easement for telephone and telegraph lines through both Indian Reservation lands and lands allotted in severalty to Indians. The last

paragraph of said Section 3, being 25 U. S. C. A. 357, upon which the State relies in this proceedings, follows this section pertaining to telephone and telegraph lines and rights of way therefor.

The Circuit Court, it is urged, is in error in interpreting the other two sections of the Act of March 3, 1901, namely 25 U. S. C. A. 311 and 319 as being controlling and decisive as to the powers of the Secretary of the Interior where a condemnation is brought for any public purpose under the terms of Section 357. The Circuit Court has construed the right of condemnation of the State as being subject to the permission or consent of the Secretary of Interior to so condemn. It is urged that the State's right to condemn such lands under Section 357 is a separate and distinct right as differentiated from the right of obtaining by negotiation an easement from the Secretary of Interior. One power is complementary of the other. It provides an alternative method of acquiring necessary easements for public purposes in the event the Secretary of Interior and the State cannot agree upon the terms or consideration to be paid for such easement. Section 357 recognizes the power of the public agency or the State to take such lands for public purposes. At the same time the rights of the Indian allottees who, for the purpose of condemnation under Section 357, are considered as owners in fee, are safeguarded by requiring compensation to be made for that which is taken. Section 311 and 319 authorize the Secretary of the Interior to grant easements and permits. Section 357 upon which the State relies, gives the power to condemn. The existence of these two powers side by side, enables the parties concerned to provide for the public well-being by agreement, and if agreement be impossible, then by and through the power of eminent domain. They

are distinct and separate remedies designed to accomplish the same purpose.

What has been the construction of Section 357 by the Department of Interior since its enactment on March 3, 1901, and what has been the practice and procedure of that Department with relation thereto? The Department has placed its own interpretation upon Section 357 since its enactment and has further made rules and regulations in accordance therewith. The Secretary of Interior, in order that there might be no mistake as to the meaning and effect of Section 357, requested an opinion from the Solicitor, and on January 2, 1923, a decision was rendered by the Honorable Edwin S. Booth, Solicitor, which was approved and adopted by the Secretary of the Interior of the same date. This decision will be found reported in the decisions of the Department of Interior relating to public lands, Volume 49 Land Decisions, page 396. We earnestly urge the court to read this decision in full as it reviews not only the Act of March 3, 1901, pertinent hereto, but also prior land decisions of the Department, and opinions of the Attorney General. The Circuit Court's decision is diametrically opposed to this and other land decisions, as well as the Interior Department's rulings and regulations issued in conformity therewith.

It will be noted in this land decision that the Department holds Section 357 as being an alternative remedy for the acquirement of lands for public purposes and is a separate and distinct remedy by eminent domain proceedings. Attention is particularly called to the following, found on the bottom of page 398 and ending on the top of page 399 as follows:

> "The fact remains, however, that allotted Indian lands can still be condemned for public purposes where nec-

essary under the provisions of the Act of March 3, 1901, supra. In other words, the remedy resting there is simply an *alternative one rather than a concurrent or an exclusive procedure.* (Italics ours). Even prior to the Act of March 3, 1901, this department held that a State could condemn allotted Indian lands for public purposes. See 19 L. D. 24. Again, the provisions of that Act came before this Department in 1905 and in an opinion dated May 11, 1905 (unreported) the then Assistant Attorney General for this Department held that under the provisions of that Act and of certain statutes of the State of Utah, lands allotted to the Indians within the Utah Reservation could be condemned in favor of persons or corporations desiring to acquire rights of way for canals, ditches, etc. In concluding that opinion it was said: 'These quotations from the law of Congress and the laws of the State answer the inquiry and leave no room for discussion or argument. Indian allotments are subject to be condemned for public purposes under the laws of the State or territory where located, before the issue of final patent, to the same extent as if the allottee held the fee to the land. The use of the land for right of way for irrigating ditches is declared by the law of Utah to be a public use in support of which the right of eminent domain may be exercised."

See 35 L. D. 648 and 45 L. D. 563.

In conformity with the Department of Interior's interpretation of Section 357 and the policy and practice consistently pursued and followed, the Department issued its printed regulations concerning "Rights of Way Over Indian Lands", printed in 1929 and issued and approved by the Department of Interior under date of May 22, 1928. Sections 68, 69 and 70 of the printed regulations, page 11, under the heading of "Condemnation of Allotted Lands", are as follows:

"68. The condemnation of allotted Indian lands for any public purpose in accordance with the laws of the State wherein the lands are situated is authorized by the last paragraph of section 3 of the act of March 3, 1901 (31 Stat. L. 1058-1083-1084).

69. Any project for which private lands could be condemned under State laws is held to be a public purpose within the meaning of the act of March 3, 1901, above cited.

70. The superintendent or other officer in charge is expected to keep in close touch with matters affecting the interests of the Indians within his jurisdiction and to report immediately through the Commissioner of Indian Affairs when any condemnation proceedings are instituted. All information available regarding such proceedings, particularly a description of the lands involved, should be given so that the Department of Justice may be requested to enter an appearance in such proceedings in behalf of the owners and to take such other action for their protection as may be warranted by the law and the facts."

To summarize, therefore, the Department having charge of Indian lands and affairs has, since 1894, and both prior and subsequent to the enactment of Section 357, administered and interpreted the law so as to permit and authorize the condemnation of lands allotted in severalty to individual Indians for any public purpose under the laws of the state or territory where the lands are situated and for such purpose the lands are deemed to be held in fee by Indians and damages paid to such allottees. This covers a period of over 40 years and this court has repeatedly laid down the rule that the construction and application for a long period of time of a law by the department or branch of government administering said law shall not lightly be set aside. This rule is aptly stated in the case of Swendig v. Washington

Water Power Company, 265 U. S. 322, concerning the interpretation by the Interior Department of certain acts of Congress relating to Indian lands as reported in Land Decisions, as follows:

> "The regulation is still in effect. The construction and application of the act so made and provided for have been followed since that time. If the meaning of the act were not otherwise plain, this interpretation would be a useful guide to the ascertainment of the legislative intention. It is a 'settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons.' Logan vs. Davis, 233 U. S. 613, 627."

Further in the case of United States vs. Jackson, 280 U. S. 183, the court on page 193, said:

> "It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the executive department charged with its administration, (cases cited); and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required."

In construing an Act of Congress which had been interpreted in a certain manner by the War Department and opinions of the Attorney General of the United States for nearly thirty years, Chief Justice Taft in the case of Wisconsin vs. Illinois, 278 U. S. 367, on page 413 stated:

> "This construction of section 10 is sustained by the uniform practice of the War Department for nearly 30 years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. U. S. vs. Minn. 270 U. S. 181, 205; Swendig vs. Washington Water Power

Company, 265 U. S. 322, 331; Kern River Company vs. U. S., 257 U. S. 147, 154; U. S. vs. Burlington & Missouri River R. R., 98 U. S. 334; U. S. vs. Hammers, 221 U. S. 220, 228. Logan vs. Davis, 233 U. S. 613, 627. The practice is shown by the opinion of the acting attorney general, transmitted to the Secretary of War, 34 Op. Atty. Gen. 410, 416. The Secretary of War acted on this view on May 8, 1899, about two months after the passage of the act. This was followed by the permits subsequently granted, down to March 3, 1925. The fact that the Secretary of War acted on this view was made known to Congress by many reports."

It is urged, however, that Section 357 supra, is neither doubtful nor ambiguous in any sense. It is also pointed out that up to the time of the decision of the Circuit Court in this case, that there was no doubt or misunderstanding as to the construction of the terms of this statute, as evidenced by the administration of said act and the practice followed by the Interior Department. The decision of the Circuit Court in the instant case has, contrary to the Government's own regulations and Land Decisions, and the practice and procedure consistently followed, created a confused and chaotic condition jeopardizing all former condemnation proceedings through lands of this type conducted and consummated by the State of Minnesota, as well as other states.

The above undoubtedly accounts for the great lack of reported cases concerning the right to condemn lands allotted in severalty to individual Indians. Presumably the only party who would raise the question as to the interpretation of the act would be the Federal government itself and particularly the Department of Interior. We find after diligent search of authorities only one reported case directly interpreting this section. This is the case of Shell Petroleum

Corporation vs. Town of Fairfax, decided by the Supreme Court of Oklahoma on June 16, 1937, and found reported in 180 Okla. 326, 69 Pac. Rep. (2d) 649, wherein the court, in connection with this subject, said:

"It is next contended by the defendants in their original brief and their reply brief that even though it be granted that the town had power to condemn non-Indian land, the power did not extend to the right to condemn land allotted to a restricted Osage Indian.

In this connection reference is made to a paragraph of Section 3 of the Act of Congress of March 3, 1901, 31 Stat. 1084 (25 U. S. C. A., Section 357) which provides 'lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned and the money awarded as damages shall be paid to the allottee.'

In view of a letter purporting to be from the Commissioner of Indian Affairs, and approved by the Secretary of the Interior, dated December 24, 1936, relating to other condemnation proceedings had in the District Court of Osage County involving allotted Osage Indian land, in which the above provision of the Act of Congress is quoted, and in which the Commissioner says, 'this law applies to Indian allotments generally, and authorizes condemnation for public purposes under the laws of the State or territory where located,' the defendants in a supplemental brief filed May 21, 1937, apparently recedes from the position first taken that said provision did not apply to allotted Osage Indian land. They now contend that if this may be done the United States is a necessary party and the proceedings cannot be had in a state court, but must be taken in a Federal court.

With these contentions we cannot agree. The Act of Congress quoted above, granting authority to condemn lands allotted in severalty to Indians, says that such lands may be condemned under the laws of the State or

Territory where located. This means the land may be condemned under the provisions of the law of the State or Territory were located. If the law of such State or Territory authorizes a town to condemn land, it may be condemned only for such purposes as the law of the State or Territory may provide. It may be condemned in the same manner. That means the same court and under the same procedure as would be the case if the land were owned in fee. If the land is owned in fee, the State court has power and jurisdiction to condemn. That act confers like authority as applied to allotted Indian land. Likewise if the land is owned in fee, the owner is the only necessary defendant. The allottee is the only necessary defendant in the condemnation of lands allotted in severalty to an Indian. Since the United States may not be sued without its consent, and no consent is given by the Act, it must be assumed that Congress intended to permit the condemnation of such land without making the United States a party."

Unquestionably the State has the right to condemn for any public purpose lands owned in fee by individual persons. Section 357 concerned herein, by the terms thereof and for the express purpose of condemnation for a public purpose, places allotted Indian lands in the very same category as lands owned in fee by individual or private persons. Therefore, if the State has the power of eminent domain to condemn lands owned in fee by private persons, then likewise has the State under Sections 357 an equal right to condemn allotted Indian lands as such section provides specifically that the Indians for such purposes are considered the owners thereof and damages accordingly paid to them.

It is submitted that the Department of Interior, as evidenced by its Land Decisions and regulations and consistent policy pursued, has rightly interpreted the power of the

State to condemn for public purposes allotted Indian lands. It must be borne in mind that this proceeding was instituted by the State of Minnesota for the location and construction of a trunk highway. The two cases relied upon by the Circuit Court, discussed hereafter, involve the use of Federal forest lands by a utility company in one case, while the other case concerned the use of strictly tribal lands by private parties for private purposes. It is urged that the purpose for which the allotted Indian lands are sought to be acquired herein is for an important purpose and would prove of general and great public benefit not only to the whites, but to the Indians as well. It is recognized that modern civilization requires and demands a modern system of roads in order to take care of the increasing transportation problems of the State and Nation.

The Circuit Court in its opinion (R. 84-92) apparently relies on two cases in substantiation of its interpretation of the Act of March 3, 1901, 25 U. S. C. A. 357, namely the Utah Power and Light Company v. United States, 243 U. S. 389, and the case of United States v. Colvard, 89 Fed. (2d) 312, which cases, it is pointed out, are in no manner related or determinative of the legal effect or interpretation of Section 357 supra, and neither do these decisions in any way aid or assist in the solution of the present controversy, for the reasons hereinbefore stated.

Utah Power and Light Company vs. United States, supra, is a case where the power company, without the benefit of any condemnation proceedings or without seeking and obtaining the permission of the Secretary of the Interior, trespassed upon a Federal forest reservation by the installation of certain power lines constructed thereon. The United States brought an action to eject the power company, and

were successful in so doing, the court holding that the power company must comply with the regulations of the Secretary of Interior or move off the Federal forest reservation. This case concerned Federal forest lands and not Indian reservation lands or the type of land concerned in this case, namely, lands allotted in severalty to individual Indians. Naturally there was no construction placed by this court on Section 357 supra, and inasmuch as the power case and the instant case concern two different matters, as well as Federal statutes, it is apparent that no parallel can be drawn between the two which would be in any way effective or determinative of the question raised in the instant case. The Circuit Court in its opinion wholly failed to differentiate between the Utah Power and Light Company case and the instant case and it is urged that the Utah Power and Light Company case supra, can in no manner be controlling as to the interpretation and practicable construction given for over thirty years as to Section 357.

The Circuit Court, as the other main authority purporting to substantiate its decision, cites and quotes from a decision of the Circuit Court of Appeals of the Fourth Circuit, United States vs. Colvard, 89 Fed. (2d) 312 (R. 90). The Court states that this case involves the building of a highway across lands held by the United States *in trust for two Indians*. This is in error as the Colvard case does not state that such is the case, and in truth and in fact, the lands involved in that case were held by the United States in trust for the Eastern Band of Cherokee Indians. We have examined the record and briefs in that case. Briefly, the facts are that the Eastern Band of Cherokee Indians conveyed tribal land by deed dated July 21, 1925, to the United States of America in trust for said tribe and for the uses and pur-

poses of the Act of June 4, 1924, 43 Stat. L. 376. The land was so held by the United States and *was not allotted to any individual Indians.* The defendants in that case had a saw mill adjoining the premises owned by the United States and in order to obtain access to said sawmill, had constructed a cartway over and across said tribal lands. They had been notified to desist and later undertook to have a cartway or roadway laid out over said lands in a proceeding in the State Court of North Carolina and pursuant to North Carolina laws. Such proceedings to lay out the cartway was brought by the defendants in their own name against the Eastern Band of Cherokee Indians and against two individual Indians who resided, as occupants only, on the lands affected. The United States brought the action against Colvard et al. in the United States District Court to enjoin them from using this cartway. The main question presented in that case was whether or not said District Court had jurisdiction in the action to protect the lands so owned by the United States in trust for the Indian Tribe. The other questions raised were as to the title of the United States in said lands which was particularly a local question as there were various transfers and special acts of Congress in relation to these lands in North Carolina and affecting the Eastern Band of Cherokee Indians in said state.

The government in its brief in said case clearly set out that under the authority of the Cherokee Nation vs. Southern Kansas Railway, 135 U. S. 641, that Congress could permit the condemnation of these lands in accordance with State laws, *but that there was no specific Act of Congress applicable to this case granting condemnation.* The brief referred to Section 4 of the Act of March 3, 1901, 25 U. S. C. A. 311, which does not grant condemnation but merely

gives the Secretary of the Interior power to authorize the establishment of highways through any *Indian Reservation*. Section 3 of the Act of March 3, 1901, *25 U. S. C. A. 357, is not mentioned* in any of the briefs submitted in that case for the obvious reason that said section did not apply to the lands therein involved as such lands were not allotted Indian lands. The two Indians named in the proceedings to acquire the cartway were merely occupants and did not hold trust patents from the government. The government particularly brings this out in its Reply Brief and stated it does not appear in this case that there are "individual Indians claiming this property".

The Circuit Court in the instant case in its opinion was, therefore, obviously in error in stating that the lands were held by the United States in trust for two Indians which would imply allotments to two Indians. We, therefore, strenuously urge that the case of United States vs. Colvard supra, does not fortify or harmonize with the decision of the Circuit Court in this case.

It is, therefore, urged that this court grant petitioner a writ of certiorari for the reasons hereinbefore stated as this case presents the interpretation of a federal statute, which interpretation for over thirty years has been construed and followed according to the Department having its administration until the decision rendered by the Circuit Court in this case which is in direct conflict with such interpretation and with the only reported case, Shell Petroleum Corporation vs. Town of Fairfax, supra. It is, therefore, necessary that the Federal statute, Section 357 supra, be construed in order that a uniform interpretation throughout the Nation might be adopted and not one construction placed in the State of Oklahoma, as evidenced by the case cited supra,

Shell Petroleum Corporation vs. Town of Fairfax, and another construction and practice followed in the State of Minnesota where similar allotted Indian lands are situated and perhaps a further construction in other states, notably Montana and Utah. It is further urged that if the judgment and decision of the Circuit Court in the instant case be made final, it will work irreparable harm and damage to the State of Minnesota inasmuch as the State has heretofore commenced and concluded numerous condemnation proceedings for the acquirement of right of way for trunk highway purposes through lands allotted in severalty to individual Indians, pursuant to Section 357 and the land decisions and regulations of the Interior Department.

It is urged that Section 357, which concerns only the condemnation for public purposes of lands allotted in severalty to individual Indians, not only expressly grants the authority and consent of Congress to the State to so condemn, but also makes it unnecessary for the State to make the United States a party to the proceeding. Such was the decision in this case of the Federal District Court, District of Minnesota, contained in its order granting the State's condemnation (R. 58), and such was the decision of the Oklahoma State Supreme Court in the case of Shell Petroleum Corporation vs. Town of Fairfax, supra. Although the State did make the United States as a party respondent, yet same was unnecessary in view of Section 357, the Treaty discussed hereafter, the Land Decisions supra, the Federal District Court's decision in this case, and the judgment of the Supreme Court of Oklahoma in the case of Shell Petroleum Corporation vs. Town of Fairfax, supra.

B.

Treaty of September 30, 1854 (10 Stat. 1109) and the Act of Congress approving, January 14, 1889 (25 Stat. 642) expressly grants lands necessary for highways, etc., through the reservation upon payment of just compensation.

The Circuit Court erred in its failure to pass upon the legal effect, intent and purpose of the Treaty and particularly that portion of Article 3 as follows:

> "All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

The court entirely ignored this basic covenant running with the land, as well as the fact that the very lands concerned with herein are lands embraced within the Indian Reservation created by virtue of said Treaty of September 30, 1854. The court likewise ignored the Act of Congress approving this Treaty on January 14, 1889, as evidenced by 25 Stat. 642. Not only the Treaty, but also the Act of Congress itself; by the very terms thereof, grants the right of way through the reservation for all necessary roads, highways and railroads, the only condition being that compensation must be paid as in other cases. This the State has done as in its eminent domain proceedings, commissioners were appointed and report duly filed with the clerk of the Federal court. In addition thereto, it is pointed out that the files and proceedings will show that no appeals were taken from any of the awards and the State has subsequently deposited for the use and benefit of the allottees the full amount of the awards of damages assessed or ascertained by the commissioners appointed by the courts. Not only is it imperative and neces-

sary to construe Section 357 supra, but likewise the terms of the Treaty concerned with herein as above quoted, as well as the Act of Congress approving the Treaty. We are unable to find any construction or interpretation of the provision of this part of the Treaty or the subsequent Congressional act approving such Treaty. The Circuit Court ignores the question. We urge that the question is important and that the right to so construct roads through lands of this type providing compensation be paid, should be interpreted so that it may be known whether the language of the Treaty and the Congressional approval means what it so plainly states or is a nullity and surplusage.

We find numerous citations interpreting treaties and the weight placed upon the terms thereof, and we find that it is the generally accepted theory of this court that a treaty constitutes a part of the supreme law of the land and should receive a fair and liberal interpretation according to the intention of the contracting parties. Suffice it to cite a few cases.

In the case of Leavenworth L. & G. R. Company vs. U. S., 92 U. S. 733, it is held that treaties, like statutes, must rest on the words used; nothing adding thereto, nothing diminishing. This court held in the case of Shew Heong vs. U. S., 112 U. S. 536, that a treaty constitutes a part of the supreme law of the land and should receive a fair and liberal interpretation according to the intention of the contracting parties. And again in the case of Baldwin vs. Franks, 120 U. S. 678, it is held that treaties made by the United States and in force are a part of the supreme law of the land and are as binding within the territorial limits of the State as they are elsewhere throughout the dominion of the United States. Also in the case of Kenneth vs. Chambers, 14 How. 38, it is held

that treaties while they remain in force are by the Constitution of the United States binding not only upon the government, but upon every citizen. Such clear, concise and convincing language and interpretation placed upon the treaties by this court must mean that it was the clear intent of not only the Federal government but of the Indians themselves when the Reservation was created, to provide for the future development of such territory by the opening of roads and railroad lines and other facilities and that the Indian, even as the white man, would likewise have these conveniences.

The question of the Treaty and particularly Article 3, granting this right, was directly raised by the State before the Circuit Court, but no reference as to this covenant or right granted is mentioned anywhere in the opinion. It is urged that the terms of the treaty alone would be sufficient unto itself to grant the right of the State to locate and construct this major constitutional trunk highway as required by the mandate of the people in the exercise of its governmental function, providing only that compensation shall be paid for such land taken. It is, therefore, recommended and urged that unless and until such time as the Treaty concerning this particular reservation and a Congressional Act abrogates the terms of such Treaty and prior approval of the Act of Congress, that the language used in Article 3 is in truth and fact a covenant running with the land and, a standing invitation to the State to so construct roads through such reservation. It is submitted, therefore, that the Treaty and Act of Congress approving same, grants the right and authority to the State to acquire, by purchase or condemnation, the necessary land of the Indians for highway purposes.

At the risk of repetition we urge the court to grant this writ of certiorari to petitioner so that the part of the Treaty

concerned herein and the subsequent Congressional act may be construed in order that the rights of the State of Minnesota so to condemn said lands under such Treaty and Congressional Act may be determined.

C.

The State's inherent power of eminent domain should permit the acquisition for highway purposes of lands allotted in severalty to Indians regardless of express Congressional authority therefor.

In the petition for certiorari herein we raise this legal proposition in the third question presented. While reliance is made in this case on the Act of Congress permitting condemnation of allotted Indian lands, and on the Treaty of September 30, 1854, we believe that this court should also pass directly upon the question as to the exercise of the sovereign power of the State to acquire by eminent domain proceedings the necessary easement for a constitutional state trunk highway. Eminent domain is without question one of the highest attributes of the sovereign. In many of the earlier decisions the validity of the exercise of this right of eminent domain by the State over the lands of the United States was recognized. United States vs. Railroad Bridge Company, 6 McLean 517, Fed. Case No. 1614; United States v. Chicago, 7 How. 185, 12 L. ed. 660; Ill. C. R. Co. v. Chicago B. & N. R. Co., (C. C.) 26 Fed. 477. In U. S. v. Railroad Bridge Company supra, the question involved was whether or not the State could acquire an easement for a roadway over lands owned by the United States. The court stated that the power has been exercised by all the States in which public lands of the United States have been situated and that

such power is essential to the prosperity and advancement of the country. The court further said:

> "It is difficult to perceive on what principle the mere ownership of land by the general government within a state should prohibit the exercise of the sovereign power of the State in so important a matter as the easements named. In no point of view are these improvements prejudicial to the general interest; on the contrary, they greatly promote it."

Apparently this theory of law was followed by the States, at least until 1917. As heretofore called to the attention of the court, so far as Indian lands were concerned, the Department of the Interior on June 25, 1894, held that a State could condemn allotted Indian lands for a public purpose, 19 Land Decisions 24, supra.

The Circuit Court in the instant case quotes from the case of Utah Power and Light Company v. United States, 243 U. S. 389 (R. 88), which case was decided in 1917. We also call the attention of the court to the case of the same title, Utah Power and Light Company v. United States, 230 Fed. 328. These cases involve the placing of power lines across a Federal forest reservation without the right being acquired by condemnation proceedings or permission of the Secretary of the Interior. The United States brought the action to eject the power company and one of the defenses raised was that the power company could have acquired the right over and across such lands by condemnation proceedings. The courts in both cases dispose of this theory by holding to the effect that the public lands involved are not subject to the State's power of eminent domain without the consent of the United States. As will be noted, neither of these cases involved a condemnation proceedings brought by the State it-

self against lands of the United States for a public purpose, and particularly as important a public purpose as the acquisition of an easement for a major constitutional State trunk highway required under the State's constitution and laws.

We deem it of the utmost importance that this court pass on this question at this time, particularly where the State is directly involved and also because of the great change in conditions since 1917.

In recent years the national government has, to an enormous extent, acquired vast areas of land in the states of the Union for various governmental purposes. These acquisitions have been made for wild life game refuges, forest reserves, rural re-settlement rehabilitation, housing, dams, power plants, and other public projects of various natures.

This court has been called upon in the past year or two to rule as to the concurrent jurisdiction over lands acquired by the government in these great projects. We refer, for instance, to the case of Silas Mason Company v. Tax Commission, decided December 6, 1937, 302 U. S. 186. We also refer to James v. Dravo Contracting Company, 302 U. S. 134, decided the same date, and we quote from page 148 thereof, as follows:

> "The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the government expand and large areas within the States are acquired."

If these vast areas acquired by the Federal government are to prove an insurmountable barrier insofar as the exercise of the State governmental functions are concerned, then in-

deed would chaos reign. This court has recognized the necessity of both the Federal and State governments cooperating for the public good where the State's performance of its required governmental functions would not be prejudicial, but in fact, be beneficial to the public. Such lands should be subject to the power of eminent domain of the State to the same extent as lands used for one public purpose may be acquired for another public or greater purpose where such added use would not be inconsistent with or defeat the first purpose.

VI.

CONCLUSION.

It is believed that the foregoing discussion and citation of authorities demonstrate clearly that the decision of the court below is erroneous and that the questions raised are important, necessitating a final determination by this Honorable Court.

WHEREFORE, petitioner respectfully requests that this Court grant the writ of certiorari prayed for herein.

Respectfully submitted,

WILLIAM S. ERVIN,
Attorney General State of Minnesota,

ORDNER T. BUNDLIE,
Assistant Attorney General State of Minnesota,
Attorneys for Petitioner,
Saint Paul, Minnesota.